No. 14,813

In the

# United States Court of Appeals

*For the Ninth Circuit*

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SOUTHERN PACIFIC COMPANY, a corporation,

*Appellant,*

v.

MARY V. HEAVINGHAM, Special Administratrix of the Estate of Arthur V. Heavingham, Deceased,

*Appellee.*

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## Appellant's Reply Brief

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A. B. DUNNE
JOHN W. MARTIN
G. BLANDIN COLBURN, JR.
DUNNE, DUNNE & PHELPS
333 Montgomery Street
San Francisco 4, California

*Attorneys for Appellant.*



PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

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## Appellant's Reply Brief

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### I.

### SIZE OF VERDICT IS RELEVANT ONLY TO SHOW APPELLANT WAS PREJUDICED BY ERRONEOUS INSTRUCTIONS

The first half of appellee's brief attempts to knock down a straw man of appellee's own creation. It is written as if we had urged as error and as ground for reversal,—which we have not,—that regardless of any other error, the amount of the verdict is excessive. Appellee cites as "dispositive of this appeal" (page 13) some very recent deci-

sions of the United States Supreme Court holding that the Courts of Appeals which sat in the respective cases should not have disturbed the respective District Court judgments for damages as excessive in amount. Appellee has also selected a number of other cases in which singularly large awards were made for personal injuries or death. These selected cases arose in a wide variety of courts, and many of them are not available in published reports (pp. 24-30). Appellee has even sought to bolster his argument against our supposed, non-existent contention by citing hearsay magazine and newspaper articles (pp. 23, 24, 27) which are completely outside the record and which could not have been admitted in evidence for appellee's purposes, even if offered.

The issues on this appeal are stated in the specification of errors in our opening brief (pages 11-12). Only two errors are relied upon: (1) instructing the jury that they could award damages for conscious pain and suffering on the part of appellee's decedent and (2) refusing appellant's request to instruct the jury that they should not include in their award any sum for conscious pain and suffering by the decedent. Exception was taken in the trial court to both the errors specified on the ground that there was no evidence of conscious pain or suffering on which such an award could be based. (Opening brief page 12). Put another way, there are only two questions for decision on this appeal:

1. Is there any evidence in the record sufficient to sustain an award to appellee for conscious pain and suffering of the decedent?

2. If there is no such evidence, did the instruction and the refusal to instruct specified as error so prejudice appellant as to constitute ground for reversal of the judgment below?

The amount of the judgment below, $75,000, is obviously pertinent to the second question.[1]

For example, if the verdict had been for $19,500 (the approximate value, discounted at 4%, of contributions by decedent of $200 per month from the date of his death to a date 10 years later when decedent would have reached the average voluntary retirement age of trainmen, between ages 66 and 67 (R 88-90, 131, opening brief page 11, Appendix),) it might plausibly be argued, to paraphrase *McCandless v. United States,* 298 US 342, 347-348, 80 L ed 1205, 1209 (1936), that it affirmatively appeared from the whole record, including the supposed $19,500 verdict, that the errors in instructions on the issue of conscious pain and suffering were not prejudicial to appellant.

The verdict and judgment below, however, was not for $19,500 but was for $75,000. Appellee says (page 2), "There is no way by which it can be established that the jury allowed *anything* for conscious pain and suffering." The shoe is rather on the other foot. There is no way by which it can be established that the jury did **not** allow a substantial sum to appellee for conscious pain and suffering, and every indication is that it did. Indeed, the purpose —which appellee misconstrues—of our analysis of the amounts which the jury might have awarded appellee for the future contributions by decedent (pages 9-11, 13-18 of our opening brief), was to demonstrate—and it does demonstrate—that there is such a wide margin between the total

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1. This was made clear at the outset of this appeal in the third of the three points upon which appellant stated it intended to rely (R 159):

> "3. The verdict for $75,000 is excessive in that it is apparent from its magnitude that the giving of the instruction erroneously authorizing the jury to consider the issue of conscious pain and suffering by the decedent was prejudicial to the defendant."

award of $75,000 and the various amounts which the jury might have awarded for the only objectively measurable element of damages, the present cash value of financial contributions, that the difference very probably included a substantial sum for conscious pain and suffering. Even this demonstration goes farther than is necessary to establish prejudice from the instructions, for appellant would have been prejudiced by even a substantial **possibility** that damages were awarded for conscious pain and suffering. It is certainly unnecessary, and would be irrelevant, for appellant to show that **even if the jury had been correctly instructed** the amount of the verdict would be so "grossly excessive" or "monstrous" as to warrant reversal by this Court. (See *Southern Pacific Co. v. Guthrie,* 186 F2d 926 (Circ. 9, 1951), cert. den. 341 US 904, 95 L ed 1343.) Yet this is the supposed line of argument at which the first half of appellee's brief is aimed. Reversal for excessiveness of the amount of a verdict returned under **proper** instructions is one thing; reversal of a verdict which, pursuant to **erroneous** instructions, apparently includes "items of claimed damage of which no evidence whatever was produced" is a very different matter. (See excerpt quoted in our opening brief, pages 24-25, from *Southern Pacific Co. v. Guthrie,* supra, at 186 F2d 931 (miscited in opening brief as at 186 F2d 926).)

Appellee, in discussing damages (appellee's brief page 21) expresses agreement with the statement on page 14 of our opening brief, "The cause of action provided by § 1 (45 USCA § 51) is an action only for damages suffered by the designated members of decedent's family, consisting of 'compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased.'" Thereafter, on the same page, appellee makes this startling assertion: "Earning

capacity and pecuniary benefits here are synonymous." This last statement is (with deference) absurd. Obviously the damages to the widow and child for the death of a railroad worker who took home $300 per month in earnings and customarily contributed $200 per month for their support would be no different if the deceased worker had instead been paid $600 per month and still contributed only $200 per month for the support of the widow and child. Indeed in the very United States Supreme Court case which is quoted with something of a flourish at the conclusion of appellee's brief (pages 55-56), *Kansas City Southern Ry. Co. v. Leslie,* 238 US 599, 59 L ed 1478 (1915), the Court reversed a judgment for plaintiff in an FELA death action for the benefit of a widow and child on the sole ground that it was error to instruct the jury that they should fix the amount of pecuniary loss to the widow and child by computing what the decedent would have earned had he lived, deducting the personal expenses of the deceased and reducing the remainder to its present value.[2] The Court declared (238 US 604, 59 L ed 1483): "A recovery [for pecuniary damages] by the

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2. The erroneous instruction was as follows (238 US 603-604, 59 L ed. 1482-1483):

> "If you find for the plaintiff, you should assess the damages at such sum as you believe from a preponderance of the evidence would be a fair compensation for the conscious pain and suffering, if any, the deceased underwent from the time of his injury until his death and such further sum as you find from the evidence will be a fair and just compensation with reference to the pecuniary loss resulting from decedent's death to his widow and child; and in fixing the amount of such pecuniary loss, you should take into consideration the age, health, habits, occupation, expectation of life, mental and physical disposition of labor, the probable increase or diminution of that ability with the lapse of time and the deceased's earning power and rate of wages. From the amount thus ascertained the personal expenses of the deceased should be deducted and the remainder reduced to its present value should be the amount of contribution for which plaintiff is entitled to recover if your verdict should be for the plaintiff."

administrator is in trust for designated individuals **and must be based upon their actual pecuniary loss.**[3] [Citing US Sup. Ct. cases]" In other words, earning capacity in itself is of no significance; except as it sets a top limit it is relevant only as one factor or circumstance to be considered in determining the amount that the decedent would have actually paid to or for the benefit of the surviving dependents.

In *Wetherbee v. Elgin, Joliet & Eastern Railway Co.,* 191 F2d 302, 311 (Circ. 7, 1951) (cited on page 15 of our opening brief), where a judgment for plaintiff in a FELA death action was reversed, it was held error to admit an actuary's testimony of the decedent's probable future gross earnings. Referring to the actuary, the court said:

> "His testimony of his calculations was merely to assist the jury on the matter of computing, and he could not properly be permitted to use as the basis for his calculations, **figures or elements which the jury could not use.** The only figure the jury was authorized to use to reduce to its present cash value was the pecuniary benefits which the beneficiaries might reasonably have received from decedent. The jury was undoubtedly misled by the actuary's figures of $83,761 and $88,652, based on decedent's probable future **gross earnings.** We think the receipt of this testimony over defendant's objections was error."[4]

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3. Emphasis by bold face type, whether within quoted material, or otherwise, is ours throughout.

4. Contrary to appellee's statements (pages 10-11), this holding was not even involved or discussed, let alone ruled upon, in *Miller v. Southern Pacific Company,* 117 CA2d 492, 256 P2d 603, cert. den. 346 US 909, 98 L ed 406. Both the opinion (117 CA2d 508, 256 P2d 612) and the appellant's opening brief in that case (pages 114-115) state flatly that the decedent was earning $4,200 per year, without distinction between gross and take-home pay. The court simply held (as to damages) that taking into account the evidence of contributions, life expectancies, loss by the minor children of care and guidance,

On pages 15 to 20 of appellee's brief there are cited a number of personal injury (not death) cases dealing with the propriety, under the respective circumstances of those cases, of showing the income taxes which the personal injury plaintiffs had been paying on their earnings, as bearing on damages for impairment of those plaintiffs' earning capacities. Appellee has not cited, and we do not know, of any case of a wrongful death action for loss of pecuniary benefits in which it has been held improper to show and consider the amounts of earnings which the decedent actually received in cash, as constituting the fund from which he made cash contributions to his beneficiaries. Since the measure of damages is the loss of pecuniary benefits, the amount of the decedent's past and prospective earnings is not the basis of computation; the significant figures in death cases are the cash contributions, which could only be derived from the decedent's take home pay.

## II.

## THE RECORD CONTAINS NO EVIDENCE SUFFICIENT TO SUPPORT ANY AWARD FOR CONSCIOUS PAIN AND SUFFERING.

Appellee declares (page 30) that we have omitted from our opening brief references to evidence which would have

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and conscious pain and suffering by the decedent, "the damages fixed herein by the jury and approved by the trial court, when it denied a new trial, are not disproportionate to any reasonable limit of compensation, certainly not so disproportionate as to indicate that the award was the result of passion, prejudice, or corruption on the part of the triers of the facts." This holding is a far cry from the only showing which we are called upon to make as to the amount of the award in the present case—simply that it was sufficiently high that it could have included damages for conscious pain and suffering as to which there was no evidentiary support in the record. Of course the United States Supreme Court's denial of certiorari in *Miller* does not (contrary to appellee's contention, page 11) signify any opinion by the Court on the merits of the case. See *United States v. Shubert*, 348 US 222, 228 n10, 99 L ed 279, 286 n10 (1955).

supported an award for conscious pain and suffering, but in the pages that follow appellee fails to point out any such proof. Appellee refers to photographs showing "the crushed engine cab" (page 31), and "the impact and wreckage of this locomotive and the caboose of the train ahead" (page 40). The only inference which could be supported by evidence that the locomotive cab was in a crushed and wrecked condition is that its occupant, the decedent, must have been rendered unconscious at the time of the impact or almost immediately thereafter and thus insensible to pain and suffering between the time of the accident and the time of death.

Appellee seeks evidentiary support on this issue in the testimony of Maasen, the fireman, that just before the impact, the decedent "stood right in front of me, almost on my feet" and that Maasen was soon thereafter burned by the breaking of a steam pipe before he was knocked out of the window of the cab. The argument is "that if Maasen could be so burned and so survive * * * the deceased could likewise have done so." (page 31)[5]

It will be noted from Maasen's testimony[6] that after the

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5. This argument proves too much; logically it leads to the conclusion that since Maasen did survive, the decedent must be still alive!

6. For the convenience of the court, this portion of Maasen's testimony is here set out in full (R 32-33):

> "So I watched the coupling of the caboose for just about a second, getting closer, and then I got up on my seat box. Mr. Heavingham had come back to my side and stood right in front of me, almost on my feet, and I got up on the seat box to shut the oil valve off at the tank. There is an emergency oil valve cord in the cab of the engine on the fireman's side for just such an occasion, or a brake-into or the engine turning over, that pulling that emergency cord will shut off the oil valve at the tank which would put out the fire in the engine.
>
> "I thought of fire immediately, and I got up on my seat box to reach for that, and at that time, why, we hit the caboose.
>
> "I was facing the—in other words, the back of the engine, my

decedent stood in front of Maasen and before the steam pipe broke in front of Maasen's face, Maasen had climbed up on the seat box, away from decedent, and was facing the rear of the engine at the time of the impact. More significantly, when Maasen was thrown out the window by the impact, he "passed out" and does not even remember hitting the ground. That Maasen at some unspecified time later regained consciousness and made frantic attempts to extricate the decedent from the cab certainly does not lend support to any hypothesis that Maasen would have regained consciousness if he had remained inside the cab, which was rapidly filling with live steam, or that the decedent did or could have been conscious for "an appreciable period of time * * * not as a mere incident of death or substantially contemporaneous with it" (Instruction to Jury, R 149).

Appellee (pages 31-32, 40-41) argues that conscious pain and suffering can be inferred from the fact that Maasen, an experienced fireman, made attempts to remove decedent from the locomotive cab as soon as Maasen had regained consciousness after being thrown out onto the ground. Obviously in such a situation Maasen would make every effort to rescue his fellow worker if he thought that there was the barest possibility of saving the latter's life; it is ridiculous to say that his action represented a carefully considered

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back, was toward the front of the engine reaching for this when it hit, and a steam pipe broke right in front of my face and burned my face quite badly, my eyes and the side of my ears and neck, and at that something else broke loose in there and hit me just a little below the chest and knocked me out the window.

"Just as I was falling out the window—I didn't want to hit the ground, because it is a long ways down, so I reached up to grab for something, and my hands came in contact with something. About that time I passed out. I don't know when I hit the ground, and I woke up crawling on my hands and knees along the right-of-way right opposite the engine over two more tracks."

opinion, in the light of his knowledge of railroading, that the decedent was still alive, let alone conscious.

Appellee overlooks the fact that she had the burden of proving not merely that decedent **survived** for an appreciable period of time beyond the accident, but that the decedent remained **conscious**, and so capable of pain and suffering, for an appreciable period. The encyclopedic reference and the two cases cited by appellee (page 34) for the presumption of a continuation of life have no bearing on the issue of consciousness during the period after an accident. The quotation from 15 Cal. Jur. 2d 78, "Death" § 2, is footnoted only to *People v. Feilen,* 58 Cal. 218, holding that in a bigamy prosecution, any presumption that the first wife was alive at the time of the second marriage would be offset by the presumption of innocence of crime, and therefore could not be applied.

In *American Sugar Refining Co. v. Ned,* 209 F2d 636 (Circ. 5, 1954) (appellee's brief, pages 34, 41-42) the issue was whether the decedent had died from an accidental injury suffered in the course of his employment, in which case his surviving beneficiaries would be entitled to benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 USCA § 901 ff, or had died of natural causes not connected with his employment. As shown by the excerpts from this case on pages 41-42 of appellee's brief, the court there held that where the decedent had fallen from a barge into the water while alive and his body was found floating in the river several days later, it could not be held as a matter of law that the decedent had died of natural causes before he was drowned and so the finding of the trier of fact below of drowning would not be disturbed.

*Occidental Life Insurance Co. v. Thomas,* 107 F2d 876 (Circ. 9, 1939) (appellee's brief, page 34) was an action on

a life insurance policy, with double indemnity for death by accident. The decedent insured went fishing in a rowboat on a very deep lake, and neither he nor his body was ever seen again, although the boat was found drifting on the lake. It was held that despite a presumption of continuation of life until the contrary is shown, there was sufficient circumstantial evidence that the insured had met his death by drowning.

To use a presumption of continuation of life to determine how long, for certain legal purposes, a disappeared person will be considered still alive, or to decide whether a man who fell off a barge into the water died of drowning or of natural causes, is a far cry from supplying missing proof of conscious pain and suffering by a "presumption" that the decedent Heavingham remained alive and (necessarily to the argument) conscious "from the time that fireman Maasen last saw him until his death was shown" (appellee's brief page 34). Certainly in *American Sugar Refining Co. v. Ned* it would never have been presumed, had it been relevant, that the decedent there remained alive, or conscious, until "his body was found floating in the river several days later" (209 F2d 637, quoted in appellee's brief page 42). Without repeating it here, we respectfully refer the court to the discussion in our opening brief, pages 18-22, of authorities which establish that to recover for conscious pain and suffering of a decedent under § 9 of the FELA (45 USCA § 59) plaintiff must affirmatively prove a substantial period, not merely contemporaneous with death, of (1) continuation of life, (2) injuries conducive to suffering and (3) continuation of consciousness.[7]

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7. The inapplicability of appellee's argument may be further demonstrated by applying the holding in *American Sugar Refining Co. v. Ned*, 209 F2d 636 (Circ. 5, 1954), the only case cited by appellee in which a presumption of continuation of life was applied in

Appellee cites a number of authorities (pages 35 to 38) for the admissibility of a death certificate as evidence of the facts stated in it, most of which deal with the use of a death certificate in determining whether a decedent committed suicide. These authorities are beside the point. We do not question that the death certificate admitted below as plaintiff's exhibit 26 (R 121) was competent, under the state and federal statutes (California Health and Safety Code § 10551, 28 USCA § 1732) as evidence of the facts stated in it, but we reiterate our position taken below (R 114) and in our opening brief (page 22) that the facts stated in the death certificate, including the statement that decedent's death was caused by scalding burns over the entire body, are without probative value because of a complete lack of any independent evidence of continued consciousness, or even survival, beyond the time of impact, especially in the face of the statements in the certificate **that the accident and the decedent's death both occurred at the same minute and hour of the same day.**

But, says appellee, affirmative proof of a substantial period of conscious pain and suffering was not required because the jury was entitled to conclude from speculation and conjecture that there was conscious pain and suffering; and for this proposition appellee cites *Lavender v. Kurn,*

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support of the holding, to the facts in *Cleveland Tankers, Inc. v. Tierney,* 169 F2d 622, (Circ. 6, 1948) (cited in our opening brief, page 21), where the record was said to be devoid of evidence of conscious pain and suffering on the part of members of the crew of a barge which was lost in a storm on Lake Erie. If the appealing barge owner, Cleveland Tankers, Inc., had contended that one or more of the crew members had died of natural causes, unconnected with the sinking, he might well have been met with the presumption invoked in *American Sugar Refining Co. v. Ned* that the seamen remained alive until they drowned, but certainly no presumption was available to the death claimants to replace affirmative proof of conscious pain and suffering.

327 US 645, 90 L ed. 916 (1946) (appellee's brief pages 35-36, 43-44). In that case the principal factual issue was whether the decedent had been killed by a blow on the head from a mail hook projecting from the side of a moving railroad car. There were precise physical facts in evidence, pertaining to the vertical and horizontal position of the mail hook, the location and height of the ground on which the decedent could have been standing, the decedent's height, etc., which, if believed by the jury, would have established that the decedent did meet his death in that way. In this context the passage from the opinion extracted by appellee (pages 35-36) gives no support to appellee's position here. The Court said (327 US 653, 90 L ed. 923):

> "Whatever facts are in dispute or the evidence is **such that fair-minded men may draw different inferences,** a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by **choosing** what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion."

Applied here, this opinion means that if there were facts in evidence which would affirmatively establish an appreciable period of conscious pain and suffering, the jury would be free to disregard conflicting evidence. But since "there is a complete absence of probative facts to support" any award for conscious pain and suffering, it was error not to withdraw that issue from the jury.

Two cases, cited by appellee as sustaining awards for conscious pain and suffering, are readily distinguishable. The excerpt quoted by appellee (page 33) from *Giles v. Chi-*

*cago Great Western Railway Co.,* 72 F Supp. 493 (D. Minn. 1947) shows that in that case there was ample evidence of prolonged conscious pain and suffering, beginning with the decedent's crawling through the cab window and walking a considerable distance in deep snow while suffering from severe and extensive burns. In *Hutchison v. Pacific-Atlantic Steamship Co.,* 217 F2d 384 (Circ. 9, 1954) (appellee's brief pages 42-43) there was positive testimony by a physician that the decedent did not die instantly but probably survived his fall by a period of hours, that there was a period of consciousness in which pain was suffered, and that such a period of conscious pain was typical of the injury which caused the decedent's death. Of course, no such affirmative evidence was presented in the case at bar.

## III.

## REVERSIBLE ERROR RESULTED FROM THE INSTRUCTION AUTHORIZING THE JURY TO AWARD DAMAGES FOR CONSCIOUS PAIN AND SUFFERING AND FROM THE REFUSAL TO INSTRUCT THAT NO SUCH AWARD COULD BE MADE.

### A. Federal Law Determines Whether an Error Is Ground for Reversal.

To support the final contention in appellee's brief, that "it was not reversible error for the Court to submit the issue of conscious pain and suffering to the jury * * *", appellee cites cases from California state appellate courts (pages 46-49, 51-52), quotations from American Jurisprudence which are footnoted only to cases from state courts (pages 52-53) and some cases from federal appellate courts. The judgment now before this Court for review is a judgment rendered by a United States District Court in an action grounded entirely upon a federal statute, the Federal Employers' Liability Act (45 USCA § 51 ff). Decisions

and rules announced by the state courts of California and other states governing what errors in the trial courts of those states will constitute ground for reversal upon appeal to the appellate courts of those states have absolutely no bearing upon a determination by a federal appellate court of whether an error committed by a federal district court in an action under a federal statute is prejudicial and reversible. As we have pointed out at length in our opening brief (pages 29-30) the old "Conformity Act," which once required that federal district courts apply certain local state court rules of procedure in their trial practice, has been repealed and in any event never applied to federal appellate proceedings, which "are governed entirely by the acts of Congress, the common law, and the ancient English statutes." (*Camp v. Gress,* 250 US 308, 318, 63 L ed 997, 1003 (1918).) In one of the very California cases cited by appellee (pages 48-49) as holding certain errors to be harmless, *King v. Schumacher,* 32 CA2d 172, 89 P2d 466, cert. den. 308 US 593, 84 L ed 496, the California District Court of Appeal clearly recognized that its holding as to what error would be ground for reversal would have no application in the federal courts. The opinion cited was on rehearing after an earlier decision reported in 81 P2d 999. In the earlier decision the Court had ordered a judgment for plaintiff in an FELA action reversed for failure to instruct the jury that the evidence was insufficient to support a finding for plaintiff upon one of the two charges of negligence asserted, even though there was sufficient evidence to support the other charge of negligence. It was stated that this holding was in accordance with well settled federal practice, citing *Wilmington Star Mining Co. v. Fulton,* 205 US 60, 51 L ed 701 (our opening brief p. 25) and *Chicago, St. Paul M. & O. R. Co. v. Kroloff,* 217 Fed. 525 (Circ. 8) (our opening brief

p. 27).[8] On rehearing the same court held that even though the error would be reversible under the federal cases, the question of whether an error is ground for reversal is a procedural question governed by the law of the forum and that it was bound by earlier state court cases, particularly *Walton v. Southern Pacific Company,* 8 CA2d 290, 48 P2d 108, to hold that the error was harmless and to affirm the judgment.[9]

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8. "* * * we are satisfied that defendants' request, that the jury be charged that the evidence was insufficient to warrant a finding against them on the issue mentioned, should have been granted. That such a refusal would constitute prejudicial error under the federal practice appears well settled (*Wilmington Star Mining Co. v. Fulton,* 205 U.S. 60, 27 S. Ct. 412, 51 L. Ed. 708; *Chicago, St. Paul M. & O. R. Co. v. Kroloff,* 8 Cir., 217 F. 525), the reasons being, as stated in the case last cited, a presumption of prejudice from error, and that the appellate court cannot know that it was not upon that baseless charge that the jury founded its verdict. Although the presumption no longer obtains in our jurisdiction (Constitution, California, Art. 6, sec. 4½), nevertheless as in *Barrett v. Southern Pacific Co.,* 207 Cal. 154, 277 P. 481, it is not possible to determine from the record upon which of the two issues the jury found the defendants guilty of negligence. As the court there said (page 486): 'Some of them may have found against the defendant on the one and erroneous theory, and the remaining jurors may have reached the same conclusion on the other theory.' We think, as was the court's opinion in the *Barrett Case,* that the error was prejudicial to a degree which reasonably supports the conclusion that the result was a miscarriage of justice.

"The judgment is reversed." (81 P2d 1002)

9. "Defendants make the further point that even though the law of this state is as stated in the decision in the *Walton* case, it is contrary to the doctrine of reversal followed in like cases in the federal jurisdiction, and that this being an action based on a federal statute, the rule of the federal courts is controlling. In opposition to this view, plaintiff cites certain cases which he contends demonstrate that no substantial conflict exists between the doctrines of the two jurisdictions. But whether or not such conflict does exist is not important, for the reason that it is well settled in both the federal and state jurisdictions, and the parties herein agree, that where as here an action founded on a federal statute is properly brought in the state courts, the law of the state, in the absence of any contrary provisions in the federal statute (and here there are none), is controlling in all matters of practice and procedure; and manifestly the process of determining

The only federal case which we have found agreeing with appellee that a federal appellate court must follow state

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on appeal whether error was committed by the trial court during the trial of the cause and if so whether such error is prejudicial and therefore constitutes ground for reversal, is a matter of practice and procedure. Referring to the judicial construction given those terms as they are used in the law, it has been said that together and in a larger sense they include the mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or declares the right (*Duggan v. Ogden*, 278 Mass. 432 [180 N. E. 301, 82 A. L. R. 765] ; Anderson's Law Dictionary) ; whereas, singly, the word 'procedure' has been defined as the machinery for carrying on the suit, including pleading, process, evidence and practice, whether in the trial court or the appellate court, or in the processses by which causes are carried to the appellate court for review, or laying the foundation for such review (*Jones v. Erie R. Co.*, 106 Ohio, 408 [140 N. E. 366]), and the word 'practice' is said to be the form, manner or order of instituting or conducting a suit or other judicial proceeding through its successive stages to the end in accordance with the rules and principles laid down by law or by the regulations and precedents of the courts. (Black's Law Dictionary, citing among other cases *People v. Central Pac. R. R. Co.*, 83 Cal. 393 [23 Pac. 303], and *Kring v. Missouri*, 107 U. S. 221 [2 Sup. Ct. 443, 27 L. Ed. 506].) Here, admittedly the enforcement of the legal rights given and declared by said federal act is committed concurrently to the state courts, and the act does not attempt to attach any conditions to the practice and procedure through which the jurisdiction of the state courts shall be exercised in the enforcement of such rights. (*Taylor v. Southern Ry. Co.*, 350 Ill. 139 [182 N. E. 805].) It follows, therefore, that the hearing and determination of the cause, not only in the trial court, but also on appeal, must be had in accordance with the rules, principles and precedents governing the practice in the state court. Moreover, a number of adjudicated cases might be cited in support of the conclusion reached herein. For example, the law of the forum has been held controlling with respect to nonunanimous verdicts (*Minneapolis & St. Louis R. R. v. Bombolis*, 241 U.S. 211 [36 Sup. Ct. 595, 60 L. Ed. 961] ; *Winters v. Minneapolis & St. L. R. Co.*, 126 Minn. 260 [148 N. W. 106] ; see, also, cases cited in 12 A.L.R. note XI, p. 713) ; and as to the submission of a cause on special verdicts (*Chesapeake & O. Ry. Co. v. Meadows*, 119 Va. 33 [89 S. E. 244] ; *Kansas City So. Ry. Co. v. Leslie*, 238 U. S. 599 [35 Sup. Ct. 844, 59 L. Ed. 1478] ; *Union Pac. R. R. Co. v. Hadley*, 246 U. S. 330 [38 Sup. Ct. 318, 62 L. Ed. 751]) ; also as to the matter of directing a verdict (*Brenizer v. Nashville, C. & St. L. Ry.*, 156 Tenn. 479 [3 S. W. (2d) 1053, 8 S. W. (2d) 1099] ; *Dutton v. Atlantic Coast Line R. Co.*, 104 S. C. 16 [88 S. E. 263]) ; and the entry of judgment *non obstante verdicto* (*Marshall v. Chicago, R. I. & P. Ry. Co.*, 133 Minn. 460 [157 N. W. 638] ; *Robertson v. Chicago, R. I. & P. Ry. Co.*, 180 Minn. 578 [230 N. W. 585].)'' (32 CA2d 181-182, 89 P2d 471-472)

law in determining whether an error committed by a federal trial court in trying a federal cause of action is ground for reversal is *Stephenson v. Grand Trunk Western Railroad,* 110 F2d 401 (Circ. 7, 1940), which we fully discussed and distinguished on pages 29-30 of our opening brief. Certainly *Toledo, St. L. & W. R. Co. v. Reardon,* 159 Fed. 366, (Circ. 6, 1908) cited by appellee (page 54) does not hold that state law is applicable.[10] Appellee italicizes (p. 56) language from *Kansas City S. R. Co. v. Leslie,* 238 US 599, 59 L ed. 1478 (1915) to the effect that a judgment on a verdict was not open to attack upon a ground specified "as the challenged verdict seems in harmony with local practice and has been approved by the courts below." Appellee fails to point out that that case came to the United States Supreme Court from the Supreme Court of the State of Arkansas, which in turn had reviewed the judgment of the Circuit Court of Little River County, Arkansas, so that of course

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10. Appellee cites this case as appearing on page 366 of 159 Federal Reporter, but apparently refers to the opinion beginning on page 366 of that volume. The language quoted by appellee does not appear in that opinion. The holding rather is that state rules as to the form of verdict are not controlling in the federal court:

> "During the argument before the jury counsel for defendant requested the court to submit to the jury in connection with the main issue certain special interrogatories in regard to particular facts, for special findings. The court denied the request, assigning as a reason that they had not been filed until during the argument to the jury. And counsel refer to a statute and decisions thereon of the courts of Ohio to the effect that such requests may be submitted at any time before the case is submitted to the jury. **But the law of the state does not control the federal courts in respect to the mode in which causes shall be submitted to a jury.** Nudd v. Burrows, 91 U. S. 441, 23 L. Ed. 286. Indianapolis, etc., R. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898; Lincoln v. Power, 151 U. S. 443, 14 Sup. Ct. 387, 38 L. Ed. 224. It was a matter entirely within the discretion of the court whether it would submit the special questions for separate findings, and its action therein cannot be assigned as error." (159 Fed. 368)

the form of the verdict was governed by the law of the Arkansas court.[11]

**B. The Errors Specified by Appellants Are Grounds for Reversal.**

In our opening brief (pages 23-32) we reviewed the federal cases on the question of whether or not an error by a United States District Court in submitting to, or refusing to withdraw from, the jury a claim of liability or damages not supported by evidence is prejudicial and reversible error. With one distinguishable exception (opening brief pages 29-30), these cases hold that such error is prejudicial and reversible. The basic "well-settled rule" is "that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial." (*McCandless v. United States,* 298 US 342, 347-348, 80 L ed. 1205, 1209 (1936). See our opening brief pages 31-32.) This rule in no way conflicts (as appellee asserts, page 55) with *Palmer v. Hoffman,* 318 US 109, 87 L ed. 645 (1943), which merely applies the corollary that "Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court."[12] Whatever may be said of the errors specified here,

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11. It will be noted that in this case the United States Supreme court reversed a judgment for plaintiff (see p. 24 below) for error in giving an instruction which closely coincides with appellee's position as to the measure of damages (see pp. 5-6 above).

12. The pertinent holding is as follows (318 US 116, 87 L ed. 651):

> "One of respondent's witnesses testified on cross-examination that he had given a signed statement to one of respondent's lawyers. Counsel for petitioners asked to see it. The court ruled that if he called for and inspected the document, the door would be opened for respondent to offer the statement in evidence, in which case the court would admit it. See Edison Electric Light Co. v. United States Electric Lighting Co. (CC) 45 F 55, 59. Counsel for petitioners declined to inspect the statement and took an exception. Petitioners contend that that ruling was

they certainly affect the substantial rights of appellant. Indeed the effect of the errors was to submit to the jury **an entire cause of action,** separate from appellee's other claims, which was entirely unsupported by evidence.[13]

In *O'Donnell v. Elgin, Joliet & Eastern Railway Co.,* 338 US 384, 94 L ed. 187 (1949) cited by appellee (page 49), a judgment for the defendant railroad was **reversed** for **error in the instructions.** It was held

> "that the plaintiff was entitled to a peremptory instruction that to equip a car with a coupler which broke in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care was to be considered on the question of this liability." (338 US 394, 94 L ed. 194)

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reversible error in light of Rule 26(b) and Rule 34 of the Rules of Civil Procedure. We do not reach that question. Since the document was not marked for identification and is not a part of the record, we do not know what its contents are. It is therefore impossible, as stated by the court below, to determine whether the statement contained remarks which might serve to impeach the witness. Accordingly, we cannot say that the ruling was prejudicial even if we assume it was erroneous. Mere 'technical errors' which do not 'affect the substantial rights of the parties' are not sufficient to set aside a jury verdict in an appellate court. [February 26, 1919] 40 Stat 1181, c 48, 28 USCA § 391. He who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted. That burden has not been maintained by petitioners."

13. Appellee's cause of action for pecuniary loss to the decedent's widow (appellee) and dependent child arises under § 1 of the FELA (45 USCA § 51), which was enacted as part of the original Act in 1908. If appellee had a cause of action for conscious pain and suffering by the decedent (which she did not prove), it would necessarily be based on § 9 (45 USCA § 59), which was added to the Act two years later, in 1910. These two causes of action, or claims for relief, are separate and distinct from one another. (*St. Louis, Iron Mountain and Southern Ry. Co. v. Craft,* 237 US 648, 656-658, 59 L ed 1160, 1163-1164 (1914). See our opening brief, pages 13-14, 30.)

The holding to which appellee refers in this case was that the form of the complaint, (which mingled in a single count charges of general negligence and of violation of the Safety Appliance Act), though disapproved, did not under the circumstances disentitle plaintiff to the prescribed instruction. This decision is very different from saying that a judgment for plaintiff would have been affirmed if there had been submitted to the jury a claim which was not supported by evidence.

Appellee says (page 54) that "apparently appellant is unaware of Rules of Civil Procedure, Rule 61[14] directly applicable to verdicts and to trial courts." This rule is, of course, the counterpart at the trial level of 28 USCA § 2111 (discussed in our opening brief pages 31-32) governing what constitutes harmless error for purposes of appellate review. The note of the Advisory Committee on Rule 61, interestingly enough, refers not only to 28 USCA § 2111, but also to *McCandless v. United States,* from which we have quoted (see page 19 above) the basic rule "that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial."

Neither of the cases cited by appellee (page 55) as construing Rule 61 modify the basic principle announced in *McCandless.* In *University City, Mo. v. Home Fire & Marine Insurance Co.,* 114 F2d 288 (Circ. 8, 1940) the ap-

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14. "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

pellant was held entitled to a **reversal** for **prejudicial error** in the admission of evidence adverse to appellant.[15]

In *Commercial Credit Corp. v. United States,* 175 F2d 905 (Circ. 8, 1949), the appeal was taken from the denial of a motion which was designed to cure the appellant's previous failure to take a timely appeal. Referring to this ruling of the trial court, the court said (175 F2d 907-908):

> "Under the undisputed facts and circumstances disclosed by the record we are of the view that it was an abuse of discretion to deny claimant's motion.
>
> "It is therefore necessary to consider whether the procedural error was prejudicial to the substantial rights of claimant and that leads us to a consideration of the second ground urged for reversal. Error is not ground for reversal unless it be prejudicial. It is a well settled rule of appellate procedure that in order to warrant a reversal the error complained of must have been prejudicial to the substantial rights of the appellant."

The court then went on to consider the "second ground urged for reversal", (that the findings of fact, conclusions

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15. After quoting Rule 61, the Court said (114 F2d 295):
"This rule is intended for the guidance of the district court, but it should be heeded by the appellate court to make it effective.
"Section 391, Title 28 USCA, Judicial Code § 269, [now 28 USCA § 2111,] provides that 'On the hearing of any appeal * * * in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' This section of the statute was included in the Act of February 26, 1919, 40 Stat. 1181. Speaking of the purpose of the statute, the Supreme Court said in Bruno v. United States, 308 U. S. 287, 294, 60 S. Ct. 198, 200, 84 L. Ed. 257, that 'that Act was intended to prevent matters concerned with the **mere etiquette of trials** and with the **formalities and minutiae of procedure** from touching the merits of a verdict.' Neither this statute nor Rule 61, supra, were intended to deprive a litigant of a **substantial right** in the trial of a case, civil or criminal."

of law and judgment were not sustained by the evidence and were contrary to law), held against appellant on the merits and affirmed the judgment.

On page 50 of appellee's brief, in the section dealing with whether the errors specified by appellant are ground for reversal, there are cited four cases, all from the United States Court of Appeals for the Seventh Circuit, which are said to state the (unspecified) "Federal Court Rule". That Court decided *Stephenson v. Grand Trunk Western Railroad Co.,* 110 F2d 401 which, as we stated in our opening brief, is the only federal appellate case which we have found contrary to *Wilmington Star Mining Co. v. Fulton,* 205 US 60, 51 L ed. 708, and which we have shown to be unsound (opening brief, pages 29-30). Although all of these four cases[16] were decided subsequently to *Stephenson,* none of them cites *Stephenson* because none of them involves the same issue. These cases merely hold that where two or more charges of negligence (or other grounds of liability) are made in the complaint, and one or more charge is supported by evidence, the defendant is not in those circumstances **alone** entitled to a directed verdict or a new trial or similar relief simply because certain other charges alleged were not supported by evidence. In *Larsen v. Chicago & N.W.R. Co.,* 171 F2d 841, the jury answered special interrogatories to the effect that the defendant had been negligent in two separate respects. Obviously the judgment for plaintiff had to be affirmed if either of the two charges on which the jury had found against defendant were supported by evidence because the jury had manifested the grounds on which the verdict for plaintiff was based. In the other three cases,

16. *Cross v. Ryan,* 124 F2d 883, cert. den. 316 US 682, 86 L ed. 1755; *Miller v. Advance Transp. Co.,* 126 F2d 442, 446, cert. den., 317 US 641, 87 L ed. 516; *Larsen v. Chicago & N.W.R. Co.,* 171 F2d 841, 844; *Kinser v. Riss & Co.,* 177 F2d 316, 317.

where several grounds of liability had been submitted to the jury, the defendants contended on appeal that the evidence was insufficient to support the general verdicts for plaintiff. None of these defendants, so far as appears, had excepted to the submission of the particular issues to the jury or to the refusal of the trial court to withdraw particular issues from the jury. The prejudicial effect of errors in instructions such as those committed here was therefore not considered at all in those cases.

We close this final portion of our reply brief, as appellee has closed her brief (pages 55-56) with still another reference to *Kansas City S.R. Co. v. Leslie,* 238 US 599, 59 L ed. 1478 (1915). That was an FELA death action, arising in an Arkansas state court, in which a judgment of $18,000 for pecuniary loss to a wife and young child and for conscious pain and suffering by the deceased had been affirmed by the Supreme Court of Arkansas. The United States Supreme Court reversed this judgment on the sole ground that the jury had been erroneously instructed on the measure of damages (see page 5 and footnote 2 above) "and the probable result was materially to prejudice plaintiff in error's rights." (238 US 604, 59 L ed. 1483) If the plaintiff in error (defendant below) in that case was prejudiced and entitled to reversal of an adverse judgment because of an instruction erroneously prescribing the measure of an admitted element of damage, surely appellant here was prejudiced and is entitled to a reversal of the judgment below for error in submitting to the jury a complete and separate element of damage—or more correctly, a complete and separate cause of action under a distinct section of the federal statute.

## CONCLUSION

Appellee has not pointed out any evidence in the record sufficient to sustain an award of damages for conscious pain and suffering, and, despite lengthy, irrelevant argument that the amount of the judgment below was in itself not excessive, appellee has failed to show that the verdict did not or could not have included such an award. Under the law governing review of judgments of United States District Courts in actions based on federal statutes, it was prejudicial error to submit the issue of conscious pain and suffering to the jury. It is respectfully submitted that the judgment below should be reversed.

Dated: January 17, 1956

A. B. Dunne
John W. Martin
G. Blandin Colburn, Jr.
Dunne, Dunne & Phelps
*Attorneys for Appellant*